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*Counsel for Plaintiff and all  
 others similarly situated*

UNITED STATES DISTRICT COURT  
 SOUTHERN DISTRICT OF CALIFORNIA

ANDREW VELASCO, on behalf of  
 himself and all others similarly situated,

Plaintiffs,

v.

GASPARI NUTRITION, INC., a New  
 Jersey Corporation, and DOES 1-10,  
 inclusive,

Defendants.

Case No. '12CV1057 L DHB

**CLASS ACTION  
 COMPLAINT FOR:**

**1. VIOLATION OF THE FALSE  
 ADVERTISING LAWS ("FAL");  
 Bus. & Prof. Code §17500 et seq.;**

**2. VIOLATION OF CALIFORNIA'S  
 UNFAIR COMPETITION LAWS  
 ("UCL"); Bus. & Prof. Code §17200  
 et seq.;**

**3. VIOLATION OF CALIFORNIA'S  
 CONSUMER LEGAL REMEDIES  
 ACT ("CLRA"), Civil Code §1750 et  
 seq.**

**DEMAND FOR JURY TRIAL**

1 Plaintiff Andrew Velasco, on behalf of himself and all others similarly  
2 situated, alleges the following upon information and belief based upon investigation  
3 of counsel, except to his own acts, which he allege upon personal knowledge:

4 **PARTIES**

- 5 1. Plaintiff Andrew Velasco is a resident of San Diego county, California and  
6 purchased Spirodex in San Diego county, California. Plaintiff relied on  
7 Defendant's representations regarding the efficacy and lack of warnings  
8 regarding the dangerous ingredients within Spirodex (hereafter referred to  
9 herein as "Product"), as detailed herein, and but for those representations and  
10 lack thereof, Plaintiff would not have purchased or paid as much for such  
11 Product.
- 12 2. Defendant Gaspari Nutrition, Inc. (hereafter "Gaspari Nutrition"), is a New  
13 Jersey corporation with its principal place of business is in New Jersey.  
14 Gaspari Nutrition develops and markets Spirodex, and has sold such products  
15 in California and across the United States of America.
- 16 3. The true names and capacities of the Defendants sued herein as DOES 1  
17 through 10, inclusive, are currently unknown to Plaintiff, who therefore sue  
18 such Defendants by fictitious names. Each of the Defendants designated  
19 herein as a DOE is legally responsible for the unlawful acts alleged herein.  
20 Plaintiff will seek leave of Court to amend this Complaint to reflect the true  
21 names and capacities of the DOE Defendants when such identities become  
22 known.
- 23 4. At all relevant times, each and every Defendant was acting as an agent and/or  
24 employee of each of the other Defendants and was acting within the course  
25 and/or scope of said agency and/or employment with the full knowledge and  
26 consent of each of the Defendants. Each of the acts and/or omissions  
27 complained of herein were alleged and made known to, and ratified by, each  
28 of the other Defendants.

## JURISDICTION AND VENUE

5. A Court has diversity jurisdiction over this class action pursuant to 28 U.S.C. § 1332 as amended by the Class Action Fairness Act of 2005 because the amount in controversy exceeds \$5,000,000, exclusive of interest and costs, and is a class action in which some members of the class are citizens of different states than the Defendant. *See* 28 U.S.C. §1332(d)(2)(A).
6. This Court also has personal jurisdiction over Defendant because Defendant currently does business in this state.
7. Venue is proper in this jurisdiction pursuant to 28 U.S.C. § 1391 because Defendant is subject to personal jurisdiction in this District and a substantial portion of the conduct complained of herein occurred in this District.

## FACTUAL ALLEGATIONS

8. Defendant manufactures, markets, and sells Spirodex as a supplement that is claimed by Defendant to "provide you with an intense feeling of mood enhancement, mental clarity and energy." The Defendant touts that Spirodex will cause "no crash or annoying 'hang over' effect." Defendant fails to warn consumers that their Product contains Dimethylamylamine, also known as DMAA, which is known to cause dangerous health effects.
9. The form of DMAA Defendant uses in the Product is a synthetic form that is both illegal and dangerous. Defendant's advertising statements failing to mention the risks associated with this ingredient is both false and misleading to consumers.
10. Defendant's DMAA is manufactured synthetically, and therefore unlawfully on the market as an ingredient in Defendant's Product which, because they include Defendant's DMAA, are both "adulterated" dietary supplements pursuant to the Food, Drug, and Cosmetic Act. Assuming, *arguendo*, Defendant's DMAA is not synthetically manufactured and it is instead naturally extracted from the geranium plant, Defendant's DMAA, by virtue of

1 its inclusion in its Product, makes the Product an "adulterated" dietary  
2 supplement and unlawfully on the market pursuant to the Food, Drug, and  
3 Cosmetic Act.

4 11. Before marketing a Product containing DMAA, manufacturers and  
5 distributors have a responsibility under the law to provide evidence of the  
6 safety of its Product. Defendant has failed to do that, which made Spirodex  
7 adulterated.

8 12. Supplement manufacturers or distributors who use certain dietary ingredients  
9 not marketed in a dietary supplement prior to October 15, 1994, which  
10 includes DMAA, are responsible for notifying the FDA of evidence to  
11 support their conclusion that their dietary supplements containing NDIs are  
12 safe. Manufacturers or distributors must submit notification at least 75 days  
13 before marketing its Product.

14 13. In fact, Defendant has received a warning letter from the FDA citing the  
15 company for marketing a Product for which a notification had not been  
16 submitted for the use of DMAA as a New Dietary Ingredient (NDI).  
17 Defendant was warned that this requirement had not been met for its  
18 marketing of Spirodex.

19 14. Gaspari Nutrition has also been advised that the FDA is not aware of  
20 evidence or history of use to indicate that DMAA is safe. Under the Dietary  
21 Supplement Health and Education Act of 1994 (DSHEA), manufacturers,  
22 marketers and distributors of dietary supplements are responsible for ensuring  
23 that they are marketing a safe product.

24 15. DMAA is known to narrow the blood vessels and arteries, which can elevate  
25 blood pressure and may lead to cardiovascular events ranging from shortness  
26 of breath and tightening in the chest to heart attack. The FDA has received  
27 42 adverse event reports on products containing DMAA, some including  
28

1 complaints of cardiac disorders, nervous system disorders, psychiatric  
2 disorders, and death.

3 16. Gaspari Nutrition has also been warned by the FDA that  
4 synthetically-produced DMAA is not a “dietary ingredient” and, therefore, is  
5 not eligible to be used as an active ingredient in a dietary supplement.

6 DSHEA defines a dietary ingredient as a vitamin, mineral, amino acid, herb  
7 or other botanical, a dietary substance for use by man to supplement the diet,  
8 or a concentrate, metabolite, constituent, extract, or combination of these  
9 substances.

10 17. Concern about the safety and legality of DMAA has spread so wide that the  
11 United States military removed all products containing DMAA from their  
12 Army and Air Force Exchange Service and Navy Exchange stores around the  
13 world on December 3, 2011. The U.S. military was prompted to remove all  
14 DMAA products from their shelves after two soldiers suffered heart attacks  
15 and died earlier in 2011 during physical training. The deaths prompted the  
16 U.S. to Army to launch an “ongoing safety review after recording a number of  
17 other serious health effects among known and potential users of products  
18 containing DMAA including kidney and liver failure, seizures, loss of  
19 consciousness, heat injury and muscle breakdown during exertion, and rapid  
20 heartbeat.”

21 18. Defendant’s misrepresentations regarding the efficacy, safety and legality of  
22 the Product was designed to, and did, lead Plaintiff and others similarly  
23 situated (collectively the “Class”) to believe that the Product was not only  
24 effective, but legal and safe as well. Plaintiff and members of the Class relied  
25 on Defendant’s misrepresentations and would not have paid as much, if at all,  
26 for the Product but for Defendant’s misrepresentations.

27 19. As a result of Defendant’s false advertising claims, Defendant has wrongfully  
28 taken millions of dollars from California and nationwide consumers.

- 1 20. Accordingly, Plaintiff brings this lawsuit to enjoin the ongoing deception of  
 2 thousands of consumers nationwide by Defendant, and to recover the funds  
 3 taken by this unlawful practice.

4 **CLASS DEFINITIONS AND CLASS ALLEGATIONS**

- 5 21. Plaintiff brings this action on behalf of himself, on behalf of all others  
 6 similarly situated, as members of the class and subclasses below (referred to  
 7 hereafter as the "Class") defined as follows:

8 California Class: The class the Plaintiff seeks to represent consists of all  
 9 persons who are citizens or residents of California who purchased Spirodex  
 10 within the four years prior to the filing of the initial complaint. Excluded  
 11 from the class are Defendant, any parent, subsidiary, affiliate, or controlled  
 12 person of Defendant, as well as the officers and directors of Defendant, and  
 13 the immediate family member of any such person. Also excluded is any  
 14 judge who may preside over this case, and such judge's immediate family or  
 15 courtroom staff.

16 Nationwide Class: The class the Plaintiff seeks to represent consists of all  
 17 persons who are citizens or residents of the United States of America who  
 18 purchased Spirodex within the four years prior to the filing of the initial  
 19 complaint. Excluded from the class are Defendant, any parent, subsidiary,  
 20 affiliate, or controlled person of Defendant, as well as the officers and  
 21 directors of Defendant, and the immediate family member of any such person.  
 22 Also excluded is any judge who may preside over this case, and such judge's  
 23 immediate family or courtroom staff.

- 24 22. This action is brought and may be properly maintained as a class action  
 25 pursuant to the provisions of Federal Rule of Civil Procedure 23(a)(1)-(4) and  
 26 23(b)(1)-(3). This action satisfies the numerosity, typicality, adequacy,  
 27 predominance and superiority requirements of those provisions.

- 28 23. [Fed. R. Civ. P. 23(a)(1)] The Class is so numerous that the individual

1 joinder of all of its members is impractical. While the exact number and  
2 identities of Class members are unknown to Plaintiff at this time and can only  
3 be ascertained through appropriate discovery, Plaintiff is informed and  
4 believes the Class includes thousands of members. Plaintiff alleges that the  
5 Class may be ascertained by the records maintained by Defendant.

6 24. [Fed. R. Civ. P. 23(a)(2)] Common questions of fact and law exist as to all  
7 members of the Class which predominate over any questions affecting only  
8 individual members of the Class. These common legal and factual questions,  
9 which do not vary from class member to class member, and which may be  
10 determined without reference to the individual circumstances of any class  
11 member, include, but are not limited to, the following:

12 (a) Whether Defendant's advertising or labeling are false or  
13 misleading;

14 (b) Whether Defendant's Product contains DMAA;

15 (c) Whether DMAA is unsafe;

16 (d) Whether Defendant's conduct violates the CLRA or other laws;

17 (e) Whether Defendant's conduct is "unfair" under Bus. & Prof. Code  
18 Section 17200;

19 (f) Whether, as a result of Defendant's misconduct, Plaintiff and the  
20 Class are entitled to damages, restitution, equitable relief and other  
21 relief, and the amount and nature of such relief.

22 25. [Fed. R. Civ. P. 23(a)(3)] Plaintiff's claims are typical of the claims of the  
23 members of the Class. Plaintiff and all members of the Class have sustained  
24 injury and are facing irreparable harm arising out of Defendant's common  
25 course of conduct as complained of herein. The losses of each member of the  
26 Class were caused directly by Defendant's wrongful conduct as alleged  
27 herein.  
28



- 1 26. [Fed. R. Civ. P. 23(a)(4)] Plaintiff will fairly and adequately protect the  
2 interests of the members of the Class. Plaintiff has retained attorneys  
3 experienced in the prosecution of class actions, including complex consumer  
4 and mass tort litigation.
- 5 27. [Fed. R. Civ. P. 23(b)(3)] A class action is superior to other available  
6 methods of fair and efficient adjudication of this controversy, since individual  
7 litigation of the claims of all Class members is impracticable. Even if every  
8 Class member could afford individual litigation, the court system could not.  
9 It would be unduly burdensome to the courts in which individual litigation of  
10 numerous issues would proceed. Individualized litigation would also present  
11 the potential for varying, inconsistent, or contradictory judgments and would  
12 magnify the delay and expense to all parties and to the court system resulting  
13 from multiple trials of the same complex factual issues. By contrast, the  
14 conduct of this action as a class action, with respect to some or all of the  
15 issues presented herein, presents fewer management difficulties, conserves  
16 the resources of the parties and of the court system, and protects the rights of  
17 each Class member.
- 18 28. [Fed. R. Civ. P. 23(b)(1)(A)] The prosecution of separate actions by  
19 thousands of individual Class members would create the risk of inconsistent  
20 or varying adjudications with respect to, among other things, the need for and  
21 the nature of proper notice, which Defendant must provide to all Class  
22 members.
- 23 29. [Fed. R. Civ. P. 23(b)(1)(B)] The prosecution of separate actions by  
24 individual class members would create a risk of adjudications with respect to  
25 them that would, as a practical matter, be dispositive of the interests of the  
26 other Class members not parties to such adjudications or that would  
27 substantially impair or impede the ability of such non-party Class members to  
28 protect their interests.



30. [Fed. R. Civ. P. 23(b)(2)] Defendant has acted or refused to act in respects generally applicable to the Class, thereby making appropriate final injunctive relief with regard to the members of the Class as a whole.

### **FIRST CAUSE OF ACTION**

#### **Business and Professions Code §17500**

#### **(Violation of the False Advertising Act)**

#### **(By Plaintiff and the Class Against All Defendants)**

31. Plaintiff hereby incorporates paragraphs 1-30 above as if set forth in full.

32. California Business and Professions Code (the "Code") § 17500 provides that

"[i]t is unlawful for any ... corporation ... with intent ... to dispose of ...

personal property ... to induce the public to enter into any obligation relating

thereto, to make or disseminate or cause to be made or disseminated ... from

this state before the public in any state, in any newspaper or other publication,

or any advertising device, or by public outcry or proclamation, or in any other

manner or means whatever, including over the Internet, any statement ...

which is untrue or misleading, and which is known, or which by the exercise

of reasonable care should be known, to be untrue or misleading ..."

33. Defendant misled consumers by making untrue statements and failing to disclose what is required as stated in the Code, as alleged above.

34. As a direct and proximate result of Defendant's misleading and false advertising, Plaintiff and the members of the Class have suffered injury in fact and have lost money or property.

35. The misleading and false advertising described herein presents a continuing threat to Plaintiff and the Class in that Defendant persists and continues to engage in these practices, and will not cease doing so unless and until forced to do so by this Court. Defendant's conduct will continue to cause irreparable injury to consumers unless enjoined or restrained.

//

**SECOND CAUSE OF ACTION**

**Business and Professions Code § 17200, et seq.**

**(Violation of the Unfair Competition Law)**

**(By Plaintiff and the Class Against All Defendants)**

36. Plaintiff hereby incorporates paragraphs 1-35 above as if set forth in full.

37. California Business and Professions Code § 17200, et seq., (the “Unfair Competition Law” or “UCL”) authorizes private lawsuits to enjoin acts of “unfair competition” which includes any unlawful, unfair, or fraudulent business practice.

38. The UCL imposes strict liability. Plaintiff need not prove that Defendant intentionally or negligently engaged in unlawful, unfair or fraudulent business practices—but only that such practices occurred.

39. The material misrepresentations, concealment, and non-disclosures by Defendant and DOES 1-10 as part of their marketing and advertising of its Product is unlawful, unfair, and fraudulent business practices prohibited by the UCL.

40. In carrying out such marketing, Defendant has violated the Consumer Legal Remedies Act, the False Advertising Law, and various other laws, regulations, statutes, and/or common law duties. Defendant’s business practices alleged herein, therefore, are unlawful within the meaning of the UCL.

41. The harm to Plaintiff and members of the public outweighs the utility of Defendant’s practices and, consequently, Defendant’s practices, as set forth fully above, constitute an unfair business act or practice within the meaning of the UCL.

42. Defendant’s practices are additionally unfair because they have caused Plaintiff and the Class substantial injury, which is not outweighed by any

1 countervailing benefits to consumers or to competition, and is not an injury  
2 the consumers themselves could have reasonably avoided.

3 43. Defendant's practices, as set forth above, have misled the general public in  
4 the past and will mislead the general public in the future. Consequently,  
5 Defendant's practices constitute an unlawful and unfair business practice  
6 within the meaning of the UCL.

7 44. Pursuant to California Business and Professions Code § 17204, an action for  
8 unfair competition may be brought by any "person . . . who has suffered  
9 injury in fact and has lost money or property as a result of such unfair  
10 competition." Defendant's wrongful misrepresentations and omissions have  
11 directly and seriously injured Plaintiff and the putative class by causing them  
12 to pay for a product because they relied on the false and misleading marketing  
13 and advertising statements of Defendant.

14 45. The unlawful, unfair, and fraudulent business practices of Defendant are  
15 ongoing and present a continuing threat that members of the public will be  
16 misled into purchasing Spirodex based on the belief that it was safe when, in  
17 fact, this is not the case.

18 46. Pursuant to the UCL, Plaintiff is entitled to preliminary and permanent  
19 injunctive relief ordering Defendant to cease this unfair competition, as well  
20 as disgorgement and restitution to Plaintiff and the Class of all of Defendant's  
21 revenues associated with Defendant's unfair competition, or such portion of  
22 those revenues as the Court may find equitable.

### 23 **THIRD CAUSE OF ACTION**

#### 24 **Civil Code § 1770, et seq.**

#### 25 **(Violation of the Consumer Legal Remedies Act)**

#### 26 **(By Plaintiff and the Class Against All Defendants)**

27 47. Plaintiff hereby incorporates paragraphs 1-46 above as if set forth in full.  
28

- 1 48. The Consumer Legal Remedies Act ("CLRA") creates a non-exclusive  
2 statutory remedy for unfair methods of competition and unfair or deceptive  
3 acts or business practices. *See Reveles v. Toyota by the Bay*, 57 Cal. App. 4th  
4 1139, 1164 (1997). Its self-declared purpose is to protect consumers against  
5 these unfair and deceptive business practices, and to provide efficient and  
6 economical procedures to secure such protection. Cal. Civil Code § 1760 et  
7 seq. The CLRA was designed to be liberally construed and applied in favor  
8 of consumers to promote its underlying purposes. *Id*
- 9 49. Plaintiff has standing to pursue this claim as Plaintiff purchased Spirodex,  
10 believing that it was safe. One of the reasons that Plaintiff purchased the  
11 Product is because he believed the Product was safe and backed by science,  
12 based on the statements and lack of disclosures or warnings by Defendant.  
13 Plaintiff relied on Defendant's advertising and have been damaged because  
14 the supplements purchased are not safe; had he known this, he would have  
15 either not bought the Product or paid less for it.
- 16 50. Defendant's wrongful business practices constituted, and constitutes, a  
17 continuing course of conduct in violation of the California CLRA since  
18 Defendant is still representing that its Product has characteristics which are  
19 false and misleading, and have injured Plaintiff and the Class.
- 20 51. More specifically, Plaintiff alleges that Defendant has violated paragraphs 5,  
21 7, and 9 of California Civil Code § 1770(a) by engaging in the unfair and/or  
22 deceptive acts and practices set forth herein. Defendant's unfair and  
23 deceptive business practices in carrying out the marketing program described  
24 above were and are intended to and did and do result in Plaintiff and Class  
25 members purchasing Defendant's Product, in violation of the CLRA. Cal.  
26 Civil Code § 1770, et seq.
- 27 52. As a result of Defendant's unfair and/or deceptive business practices, Plaintiff  
28 and all consumers who purchased Defendant's supplement Product have

1 suffered damage and lost money in that they paid for a Product that did not  
2 have the characteristics and benefits as represented. Plaintiff seeks and is  
3 entitled to an order enjoining Defendant from continuing to engage in the  
4 unfair and deceptive business practices alleged herein.

5 53. Pursuant to Section 1782 of the CLRA, Plaintiff intends to notify Defendant  
6 in writing of the particular violations of Section 1770 of the CLRA (the  
7 "Notice Letter"). If Defendant fails to comply with Plaintiff's demands  
8 within thirty days of receipt of the Notice Letter, pursuant to Section 1782 of  
9 the CLRA, Plaintiff will amend this Complaint to further request damages  
10 under the CLRA.

### 11 PRAYER FOR RELIEF

12 WHEREFORE, Plaintiff, individually and on behalf of the Class, prays for  
13 relief and judgment as follows:

14 1. For preliminary and permanent injunctive relief enjoining Defendant,  
15 its agents, servants and employees, and all persons acting in concert with them,  
16 from engaging in, and continuing to engage in, the unfair, unlawful and/or  
17 fraudulent business practices alleged above and that may yet be discovered in the  
18 prosecution of this action;

19 2. For certification of the putative class;

20 3. For restitution and disgorgement of all money or property wrongfully  
21 obtained by Defendant by means of its herein-alleged unlawful, unfair, and  
22 fraudulent business practices;

23 4. For an accounting by Defendant for any and all profits derived by  
24 Defendant from its herein-alleged unlawful, unfair, and/or fraudulent conduct  
25 and/or business practices;

26 5. An award of statutory damages according to proof, except that no  
27 damages are currently sought on Plaintiff's Cause of Action regarding the  
28 Consumer Legal Remedies Act at this time;

1           6.     An award of general damages according to proof, except that no  
2 damages are currently sought on Plaintiff's Cause of Action regarding the  
3 Consumer Legal Remedies Act at this time;

4           7.     An award of special damages according to proof, except that no  
5 damages are currently sought on Plaintiff's Cause of Action regarding the  
6 Consumer Legal Remedies Act at this time;

7           8.     Exemplary damages, except that no damages are currently sought on  
8 Plaintiff's Cause of Action regarding the Consumer Legal Remedies Act at this  
9 time;

10          9.     For attorneys' fees and expenses pursuant to all applicable laws  
11 including, without limitation, Code of Civil Procedure §1021.5, the CLRA, and the  
12 common law private attorney general doctrine;


13          10.    For costs of suit; and

14          11.    For such other and further relief as the Court deems just and proper.

15 DATED: April 30, 2012

KIRTLAND & PACKARD LLP

16  
17 By:

  
MICHAEL LOUIS KELLY  
BEHRAM V. PAREKH  
HEATHER M. PETERSON  
*Counsel for Plaintiff and all others  
similarly situated*



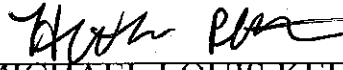
**DEMAND FOR JURY TRIAL**

Plaintiff hereby demands a trial by jury for all causes of actions so triable.

DATED: April 30, 2012

KIRTLAND & PACKARD LLP

By:

  
MICHAEL LOUIS KELLY  
BEHRAM V. PAREKH  
HEATHER M. PETERSON  
*Counsel for Plaintiff and all others  
similarly situated*

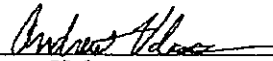
LAW OFFICES  
KIRTLAND & PACKARD LLP

1 I, Andrew Velasco, declare as follows:

2 1. I am a Plaintiff in this action, and am a citizen of the State of California. I have  
3 personal knowledge of the facts herein and, if called as a witness, I could and would testify  
4 competently thereto.

5  
6 2. The Complaint in this action, filed concurrently with this Declaration, is filed in the  
7 proper place for trial under Civil Code Section 1780(d) in that San Diego County is a county in which  
8 Defendants are doing business.

9  
10 I declare under penalty of perjury under the laws of the State of California that the foregoing is  
11 true and correct.

12  
13   
14 Andrew Velasco